

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

613

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,871

UNITED STATES OF AMERICA,

APPELLEE,

vs.

DAVID ANTHONY,

APPELLANT

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 5 1969

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.	i
STATEMENT OF ISSUES PRESENTED.	1
REFERENCES TO RULINGS.	1, 2
JURISDICTIONAL STATEMENT.	2
STATEMENT OF THE CASE.	2-9
SUMMARY OF ARGUMENT.	9-11
ARGUMENT:	
I. <u>Where There is A Two Count Indictment, When the Jury Finds The Defendant Guilty Of One Count And Not Guilty On The Other, The Guilty Count Cannot Stand Unless Supported By Evidence Independent Of Facts Necessarily Found By The Jury In Arriving At The Not Guilty Count.</u>	11,15
II <u>A Guilty Verdict On Count Two Of The Indictment Which Is Inconsistent With A Not Guilty Verdict On Count One Of The Indictment Should Not Be Permitted To Stand Where It is Patently Clear That The Evidence Adduced Could Not Fairly Permit A Jury To Find Proof Of All Of the Elements Of Guilt Beyond A Reasonable Doubt On The Second Count.</u>	15-16
III <u>A Defendant Is Entitled To A Unanimous Verdict On Each Count Of The Indictment By A Jury Of His Peers and When A Factually Inconsistent Verdict Is Returned Such A Defendant Is Denied This Right.</u>	16-17
IV <u>The Trial Court Erred In Instructing The Jury That In Order To Convict, It Suffices That There Be An "Attempt or Effort With Force Or Violence To Do Injury To The Person Of Another, Coupled With The Apparent Present Ability To Carry Out Such An Intent"</u>	17-18
CONCLUSION.	18-19

TABLE OF AUTHORITIES

Cases:

	Page
<u>Andres v. United States</u> , 333 U.S., 740, 748, 68 S. Ct. 880, 884 (1949)	16
<u>Cook v. United States</u> , 90 U. S. App. D. C. 90, 193 F. 2d 373 (1951)	13
<u>Dunn v. United States</u> , 284 U. S. 390, 52 S. Ct. 189(1932)	13
<u>Green v. United States</u> , 355 U. S. 184, 188, 78 S. Ct. 221, 223 (1957)	17
<u>Price v. United States</u> , 156 Fed 950 (9th Cir. 1907) . . .	18
* <u>Rosenthal v. United States</u> , 276 F. 714 (9th Cir. 1921) . .	14
* <u>Sealfon v. United States</u> , 332 U.S. 575, 578, S. Ct. 237(1948)	13
<u>State v. Fling</u> , 69 Ariz. 94, 210 P. 221 (1949)	14
<u>Tatum v. United States</u> , 71 App. D. C. 393, 110 F. 2d 555 (1940)	18
<u>United States v. Jackson</u> , 30 U. S. 570, 88 S. Ct. 1209 (1968)	16
* <u>United States v. Mavbury</u> , 274 F 2d 899 (2nd Cir. 1960) . . .	16, 17
* <u>United States v. Moloney</u> , 200 F 2d 344(7th Cir. 1952) . . .	14, 15

Statutes

U. S. Code, Title 28, Sec. 1291	2
D. C. Code, Title 22, Sec. 502.	2
Constitution of the United States, Sixth Amendment.	16

Other Authorities

6 Am. Jr. 2d, Assault and Battery, Sec. 54.	18
66 C.J.S. 197-8 (New Trial 66 1950)	15
Annot. 74 A. L. R. 1206 (1931)	18
*3 <u>Underhill on Criminal Evidence</u> , Sec. 688 (5th ed 1957) . .	18

*Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUES PRESENTED

- I Did the trial Court below err in permitting an arbitrary guilty verdict by the jury on Count Two of the indictment to stand without supporting evidence, when on the same facts and evidence the same jury returned a verdict of not guilty on the First Count of the indictment.
- II Did the Court below err in refusing to set aside a guilty verdict on Count Two of the indictment which was inconsistent with a not guilty verdict on Count One of the indictment where it is patently clear that the evidence adduced by the Government could not fairly permit a jury to find proof of all of the elements of guilt beyond a reasonable doubt, on the Second Count of the indictment.
- III Was not error committed in the Court below when defendant was denied his right to a unanimous verdict on each count of the indictment by a jury of his peers, and when a factually inconsistent verdict was so returned is not such a defendant denied this right.
- IV Did the trial judge err in instructing the jury that in order to convict of criminal assault with a dangerous weapon it suffices that there be "an attempt and effort with force or violence to do injury to a person of another, coupled with the apparent present ability to carry out such an intent".

This case has not previously been before this Court under the same or a similar title.

REFERENCES TO RULINGS

Appellant filed separate motions for a judgment n.o.v. and for a new trial (Rec. Doc. No. 13) seeking to have the lower court set aside the

verdict of the jury as to the Second Count of the indictment and grant appellant judgment n.o.v. and/or a new trial.

The trial court defined the crimes set forth in the indictment (Tr. 494) to which appellant noted an exception (Tr. 498).

The trial Court subsequently further instructed the jury after they began their deliberations (Tr. 503-507) to which appellant anticipatorily excepted (Tr. 502-503).

JURISDICTIONAL STATEMENT

This appeal is from a judgment of the United States District Court for the District of Columbia entered on January 24, 1969 (Rec. Doc. 16-17) convicting appellant of the Second Count of the indictment (Rec. Doc. 1) charging him with assault with a dangerous weapon in violation of Title 22, Section 502 of the District of Columbia Code, 1967 Edition, as amended. Appellant was granted leave to proceed on appeal without prepayment of costs and his appeal was duly noted and prosecuted in this Court.

The jurisdiction of this Court is invoked under 28 USC Section 1291.

STATEMENT OF THE CASE

The appellant, David Anthony, was charged in an indictment (Rec. Doc. 1) with the commission of two offenses of assault with a dangerous weapon. The first Count charged him with such an assault on to-wit January 19, 1968, on one Dorothy Evans, and the Second Count charged him with such an assault on one Alta Armstrong.

The Government's first witness, Alta Armstrong, the complainant in the Second Count of the indictment (Tr. 15-54) testified that the appellant assaulted her by striking her on the head with a gun (Tr. 22).

The next Government witness was Officer James Adams Kornegay (Tr. 56-65). Officer Kornegay testified that he found a 32 caliber revolver on the front porch of the premises 409 - 16th Street, S. E. (Tr. 56). He testified on cross-examination that in this situation there could have been more than one weapon used (Tr. 72). He testified further that he searched the person of the appellant Anthony and found no lethal weapon on him of any kind (Tr. 72-73). He testified further that he saw the appellant lying on the front porch of premises 409 - 16th Street, S. E. and that said appellant had been shot three times or possibly four times (Tr. 66-68).

The next Government witness was Beulah P. Dunn, Medical Records Custodian at D. C. General Hospital (Tr. 84-87), who testified concerning alleged treatment of the complainant, Alta Armstrong, at D. C. General Hospital.

The next Government witness was Dorothy Evans, who testified that she owned a 32 caliber revolver (Tr. 99). She testified further that she took her gun and fired possibly four shots at the appellant (Tr. 103). She testified further that the gun shown to her, Government's Exhibit No. 1, was not the gun she owned (Tr. 108). On cross-examination this witness stated that six or eight shots could have been fired in the melee on the porch (Tr. 142) and that the last time she saw the appellant he was lying on the porch (Tr. 143).

At the conclusion of the Government's case in chief, the appellant moved by Court to dismiss the indictment as to both counts and to direct a verdict of not guilty in favor of the appellant (Tr. 145-146).

Thereafter the defense presented its case, the first witness

being the appellant, David Anthony, (Tr. 152-169(300), 303-369). Appellant testified that he had known the complainant, Dorothy Evans, over the years and had helped her financially (Tr. 153), and that he had never owned a gun (Tr. 154). He testified further that he had seen a gun in the possession of Dorothy Evans before January 19, 1968, (Tr. 154-156). He testified further that prior to January 19, 1968, that is on or about January 15, 1968, he had difficulty with Dorothy Evans (Tr. 159-160).

He testified further that the complainant, Alta Armstrong, mother of Dorothy Evans, had threatened him with serious bodily harm prior to January 19, 1968 (Tr. 160-161).

Appellant testified further that on January 19, 1968, he went to the home of Dorothy Evans at her instance because she called him and requested him to come there (Tr. 163) and that he knocked on the door and never got into the house, since Dorothy Evans came to the door with a pistol and started shooting at him while he was on the front porch (Tr. 164). He testified further that Dorothy Evans' mother Alta Armstrong parked her car in the street and came up on the porch and with her gun in hand started shooting at him (Tr. 165-168). He testified further that he never struck the complainant, Alta Armstrong, with a gun or anything else (Tr. 167-168).

Defendant's Exhibit No. 2, a 22 caliber bullet was shown to appellant (Tr. 307) and he testified that the same was surgically removed from the back of his neck at D.C. General Hospital by a Dr. Anthony (Tr. 307-308, 310). He testified further that he was shot in the chest with a 32 caliber bullet (Tr. 309).

On cross-examination appellant stated that he saw Dorothy Evans with a gun in November 1967 (Tr. 319-321). He further stated that she possessed a 22 caliber gun (Tr. 328). He further testified that the complainant, Alta Armstrong, shot him with her gun, a 32 caliber gun, (Tr. 340, 351-353, 353-358, 358, 359, 362, 363) during which time Alta Armstrong stated she will finish off appellant. And he stated further that the complainant, Dorothy Evans, shot him with a 22 caliber gun, her gun (Tr. 341, 345-349). Appellant testified that he did not strike Alta Armstrong (Tr. 360).

Appellant further testified on cross-examination that a bullet was taken out of his neck at D. C. General Hospital by a Dr. Anthony, who in turn gave it to him on February 13, 1968 (Tr. 363-365). Appellant further testified that he turned this slug over to his attorney the same day that he got it from the doctor (Tr. 366); he further testified that other bullets received when he was shot on January 19, 1968, still remained in his body (Tr. 367).

Appellant's next witness for the defense was Eleanor Palmer, secretary in the office of appellant's counsel, Mr. Lyman, she testified that appellant Anthony brought the bullet taken out of the back of his neck to counsel's office inside an envelope on February 13, 1968, where it remained until brought to Court for trial as a defense exhibit (Tr. 370-371). The next witness for appellant was Dr. Ruppert Edward Louison who brought records, defendant's exhibit No. 3, the records from D. C. General Hospital concerning appellant Anthony (Tr. 372-374). He testified that appellant Anthony suffered multiple gun shot wounds, one over his right eye, one in the left side of his neck, one through the lateral aspect of his forefinger and one over the right anterior chest (Tr. 374-375) and

that as a result of these wounds appellant Anthony was confined in the intensive care unit of D. C. General Hospital and subsequently was required to remain in the hospital for at least 11 days thereafter (Tr. 374-376). This witness further testified that the wound in appellant's chest was very serious, causing him to lose a tremendous amount of blood, and requiring immediate and intensive care and surgery (Tr. 376-377). He also testified the chest wound required the insertion of a large tube and that in the process the bullet therein was removed by a pump, and that as a consequence thereof appellant required a blood transfusion in connection with the intensive care and special treatment that he had to receive because of the danger and seriousness of his wounds, particularly his chest wound (Tr. 377, 380-381).

This witness testified further that a bullet was removed from the nape of appellant's neck on February 13, 1968, by a Dr. Anthony, and that subsequently on February 27, 1968, sutures were removed from the wound in the nape of appellant's neck (Tr. 379-381).

Appellant called as a defense witness Officer Kornegay, a member of the Metropolitan Police Department (Tr. 393-402) who had previously testified as a Government witness, who was shown defendant's Exhibit No. 2, and he stated that this was a 22 caliber bullet (Tr. 395-400).

Thereafter appellant called two witnesses on his behalf, who offered character testimony as to the reputation of appellant for truthfulness and veracity and for his good conduct. The witness, Tracey Williams (Tr. 404-407) testified as a character witness. The witness, Ernest Lee Stewart, (Tr. 407-409) testified as a character witness.

Thereafter defendant's Exhibit No. 1 and 1A were offered and received in evidence by the Court (Tr. 416).

Appellant called as his next witness, Dr. James William Anthony (Tr. 434-442) a physician, who stated that he treated appellant Anthony at D. C. General Hospital on January 19, 1968 (Tr. 435-436). Dr. Anthony described the wounds of appellant (Tr. 437) and stated that appellant required intensive care (Tr. 437-438). This physician witness testified that he performed surgery in the area of the nape of the neck of appellant and removed a small caliber bullet, a 22 bullet, on February 13, 1968, and that he gave the same forthwith to appellant (Tr. 438-439). On cross-examination the witness, Dr. Anthony, described the bullet and unequivocally stated that after removing the same from the nape of the neck of appellant, that he gave the same to appellant (Tr. 440-442).

Thereafter appellant called as his last witness, Robert M. Zimmer, a ballistic expert from the FBI. (Tr. 442-451). This witness was a firearms identification expert and a special agent of the FBI, who qualified as an expert in ballistics (Tr. 443). He identified Government's Exhibit No. 1 in evidence, the weapon which allegedly caused injury to the complainants as a 32 caliber spanish made revolver currently and frequently sold in the United States market (Tr. 444). This expert further testified that defendant's Exhibit in evidence No. 2, the alleged slug taken from the nape of the neck of the appellant Anthony, was a 22 caliber bullet (Tr. 447). He testified further that defendant's Exhibit No. 2, the 22 caliber bullet, could not have been fired from Government Exhibit No. 1, the 32 caliber revolver, and that the 22 caliber bullet would not fit into the 32 caliber cartridge case, Government Exhibit No. 2 (Tr. 448). This witness testified unequivocally that defendant's Exhibit No. 2, the 22 caliber bullet, was fired from a 22 caliber weapon (Tr. 451).

At the conclusion of this witness's testimony the defense rested (Tr. 451).

Thereafter the Government on rebuttal called one witness, Alta Armstrong (Tr. 452), and at the conclusion of her testimony rested its case (Tr. 457). Thereafter defendant moved the Court to direct a verdict of not guilty and enter a judgment of acquittal for and on defendant's behalf on both counts of the indictment (Tr. 457-458). Thereafter the Court denied defendant's motion for a directed verdict and judgment of acquittal (Tr. 458-459).

Thereafter the Court charged the jury (Tr. 481-497, 499). The Court in its charge defined the offense of assault (Tr. 494-495). At the conclusion of the Court's charge, appellant noted exceptions, and at (Tr. 498) noted an exception to the Court's definition of assault with a dangerous weapon. After the jury retired to consider its verdict (Tr. 501) a question and note, dated 11/18/68 was sent to the Court on 11/19/68 (Tr. 501-504) (Rec. Doc. 12). This question in essence asked the Court to reinstruct the jury as to three elements to be satisfied in order to find the defendant guilty. Defendant objected to the Court reinstructing the jury as requested and objected to the Court's answer to the jury's note, the same being a restatement of a previously given part of the Court's original charge and instructions (Tr. 502). Notwithstanding defendant's objection, the Court did proceed to restate a part of its original charge to the jury concerning its question and inquiry (Tr. 504-507).

The jury then retired again and upon returning to the Court to announce its verdict, found the defendant not guilty on Count One and guilty on Count Two (Rec. Doc. 12) and thereafter the Court discharged

the jury, and subsequent thereto the Court denied appellant's motions for judgment n.o.v. and for new trial (Rec. Doc. 13) entering its order of denials accordingly (Rec. Doc. 14).

Thereafter defendant was sentenced by the Court (Rec. Doc. 16) and the Court entered its judgment accordingly (Rec. Doc. 16). From the verdict of the jury and the sentence and judgment of the Court appellant noted an appeal to this Court (Rec. Doc. 15)

SUMMARY OF ARGUMENT

The jury acting as a trier of fact found that appellant did not assault Dorothy Evans, complainant in the first count of the indictment. Such a verdict of not guilty negated possession of the 32 caliber pistol, which the Government asserted was in the hands of appellant causing this complainant to be shot in the back. In view of this verdict on the First Count of the indictment a determination of guilt of this defendant could hardly be anything more than an arbitrary determination of appellant's guilt on the second count of the indictment unsupported by facts or evidence to justify the same. In returning a verdict on separate counts, the verdicts must be supported by facts and evidence consistent therewith. Consequently a jury's verdict of guilty on the second count of this indictment, which lacks proof of all the essential elements of the crime is an arbitrary verdict and should not be permitted to stand.

II

The Court below erred in refusing to set aside the guilty verdict on Count Two of the indictment and to grant appellant's motions

for judgment n.o.v. and/or for new trial (Rec. Doc. 13). A jury can not ignore the charge of the Court (Tr. 481-497, 499) and assert by its verdict that it finds appellant guilty of the second count of the indictment, when proof of guilt beyond a reasonable doubt of each and all of the elements of the offense of assault with a dangerous weapon neither existed nor were made manifest by the proof and evidence offered in the trial of the case in support of the same. The verdict of the jury on the second count of the indictment here is clearly inconsistent with the not guilty verdict on Count One of the indictment and this inconsistency in the jury's verdict is unequivocal, since the jury's verdict on Count One of the indictment negated appellant's ability to commit the alleged overt act of assault with a dangerous weapon set forth in the second count of the indictment.

III

The appellant as a defendant in the Court below was entitled to a unanimous verdict on each count of the indictment by the jury consistent with the evidence adduced at the trial. A jury is not licensed to speculate on the existence of proof of guilt nor to compromise the fate of a defendant when adequate proof of guilt beyond a reasonable doubt is lacking as to the second count of the indictment, merely because the jury is called upon to decide and determine two alleged offenses set forth in one indictment. A verdict of the jury must be consistent with the facts and evidence adduced at the trial in order to be valid and subsisting; and these conditions obtain with respect to the jury's determination with respect to each count of the indictment. The same facts adduced at a trial concerning two separate counts in the indictment can not support inconsistent verdicts of a jury, since this obviously negated due process and denies unto defendant fundamental rights assured unto him by the law.

IV

The trial Court erred in its instructions to the jury (Tr. 481-497, 499). The Court's definition of the offenses set forth in the indictment, was neither adequate nor sufficient as a matter of law, with respect to the evidence adduced in this case. The extent to which the Court's instructions were confusing to the jury, and particularly with reference to the definition of the offenses charged to the appellant in the indictment, and the elements of proof beyond a reasonable doubt required to be found by the jury, before guilt could be established, became quite obvious and were indeed, made manifest by the jury's note to the Court (Rec. Doc. 12) after the jury had originally retired to deliberate its verdicts. Hence, it is submitted that such error denied the appellant due process and the protection of his fundamental rights in this case.

ARGUMENT

WHERE THERE IS A TWO COUNT INDICTMENT, AND WHEN THE JURY FINDS THE DEFENDANT GUILTY OF ONE COUNT AND NOT GUILTY ON THE OTHER, THE GUILTY COUNT CANNOT STAND UNLESS SUPPORTED BY EVIDENCE INDEPENDENT OF FACTS NECESSARILY FOUND BY THE JURY IN ARRIVING AT THE NOT GUILTY COUNT

Upon consideration of the evidence adduced at the trial of this case in the Court below, the jury was fully justified in finding appellant, "not guilty" on the first count of the indictment. In light of this finding and determination by the jury on the first count of the indictment, there was not and is not sufficient probative evidence, independently existing thereon, to warrant the jury in finding the appellant "guilty" on the second count. Such a finding by the jury was

merely "an arbitrary" finding and determination, resulting in an arbitrary verdict by the jury. The Court should not have permitted this arbitrary verdict to stand, and should have granted appellant's motion for judgment n.o.v. and/or his motion for a new trial (Rec. Doc. 13).

The record is devoid of any evidence that appellant was possessed of a gun or any other lethal weapon on January 19, 1968, when he came to premises 409 - 16th St., S. E., Washington, D. C. (Tr. 154), at the request of the complainant, Dorothy Evans (Tr. 163). The only guns put into use were the gun owned by Dorothy Evans, who started shooting at appellant when he was on her front porch (Tr. 164), and the gun owned and held in the hand of the complainant, Alta Armstrong, Dorothy Evans' mother, who also began shooting at appellant while he was on the porch (Tr. 165-168).

The record is clear and unequivocal that only one gun, a 32 Caliber revolver was found by the police (Tr. 56). Officer Kornegay further stated that more than one weapon could have been used in the melee that occurred on the front porch of premises 409 - 16th Street, S. E. (Tr. 72). He testified further that he found no weapon of any kind on the person of appellant (Tr. 72-73).

The testimony of Dr. James William Anthony that he treated appellant on January 19, 1968, was unimpeached (Tr. 435-438); and Dr. Anthony's further testimony that he removed a 22 caliber bullet from the nape of appellant's neck on February 13, 1968, and forthwith gave the same to him (Tr. 438-439) was also unimpeached.

The testimony of Robert M. Zimmer, a special agent of the FBI and a fire arms identification expert, was unimpeached (Tr. 442-451). He testified that defendant's exhibit in evidence No. 2, the

slug taken from the nape of the neck of appellant was a 22 caliber bullet (Tr. 447), and that this bullet was fired from a 22 caliber weapon (Tr. 451).

The verdict of the jury on the first count was conclusive that appellant did not have a gun in his possession. This determination was made by the jury as the trier of fact, and accordingly the appellant was found not guilty on Count One. The finding that appellant did not have a gun could be pleaded as res judicata in a subsequent trial growing out of the same set of facts. The Supreme Court has said:

"But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different. Sealfon v. United States, 332 U.S. 575, 578, 68 S. Ct. 237 (1948)"

The Sealfon case has repudiated the underlying basis of the decision in Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189 (1932) which was that res judicata did not apply to a criminal case. Because the Court in Dunn found that res judicata did not apply, it allowed an inconsistent verdict to stand.

Thus when offenses growing out of the same set of facts are tried separately, the facts as found in the first case must apply in the second case. To permit a jury to deviate from this rule of law in the instance where the charges are tried together no longer has any rational basis in law. Strong support for this proposition is found in Cook v. United States, 90 U. S. App. D. C. 90, 193 F. 2d 373 (1951).

In returning a verdict on separate counts, such verdicts must be supported by facts and evidence consistent therewith. The case

of Rosenthal v. United States, 276 F. 714 (9th Cir. 1921), did not permit inconsistent verdicts to stand, and accordingly reversed the determination of the jury in the Court below when it returned inconsistent verdicts. Such a condition appellant submits obtains in the case at bar.

In the case of State v. Fling, 69 Ariz. 94, 210 P. 2d 221 (1949) where the facts were not identical, but somewhat similar to those in the case at bar, involving charges of assault with a dangerous weapon, the Court did not permit inconsistent verdicts unsupported by adequate independent evidence as to each count to stand, and accordingly reversed the lower court. In State v. Fling, supra, the jury found as to one count that defendant did not have a gun in his possession as in the case at bar, here, and accordingly a verdict of guilty on a second count, charging assault, based upon the same evidence and facts applicable to the first count, was not permitted to stand.

The verdict of the jury in the case at bar on the second count of this indictment lacked proof of all the essential elements of the offense and consequently this arbitrary verdict should not be permitted to stand. The capability of appellant to commit the offense charged in the second count of the indictment was completely negated by the jury's "not guilty" verdict as to the first count of the indictment. Appellant submits that an essential element of proof as to the alleged charge of assault in the second count of the indictment, that is, the overt act, was absent and consequently the evidence was insufficient to support the jury's verdict of guilty thereon. In the case of United States v. Moloney, 200 F. 2d 344 (7th Cir. 1952) where defendant was charged with two counts in one indictment, the jury

returned a verdict of not guilty on one count and guilty on the other, the Court found the verdicts inconsistent and did not permit the guilty verdict to stand. The court stated in substance, that there was not sufficient evidence relevant against appellant to sustain the guilty verdict of the second count of the indictment and stated that the District Court erred in failing to grant appellant's motion for a directed verdict there. United States v. Moloney, supra at 347. Appellant in the case at bar submits that his motion should have been granted as the evidence was insufficient to sustain a verdict of guilty on the second count of the indictment here.

II

A GUILTY VERDICT ON COUNT TWO OF THE INDICTMENT WHICH IS INCONSISTENT WITH A NOT GUILTY VERDICT ON COUNT ONE OF THE INDICTMENT SHOULD NOT BE PERMITTED TO STAND WHERE IT IS PATENTLY CLEAR THAT THE EVIDENCE ADDUCED COULD NOT FAIRLY PERMIT A JURY TO FIND PROOF OF ALL OF THE ELEMENTS OF GUILT BEYOND A REASONABLE DOUBT ON THE SECOND COUNT

Appellant submits that the total absence of adequate probative evidence to warrant the jury in finding him guilty on the second count of the indictment in the case at bar, invalidates this "guilty" verdict, and the same should be set aside.

In civil cases where the burden of proof is less than that demanded by a criminal trial, an inconsistent verdict requires a new trial. In a civil case where there is a lower standard of proof, an inconsistent verdict is not tolerated.

"Ordinarily, a verdict may and should be set aside and a new trial granted where it is self contradictory, inconsistent or incongruous and such relief should, as a rule, be granted where more than one verdict are returned in the same action and they are inconsistent and irreconcilable. 66 C.J.S. 197-8 (New Trial 66 1950)"

In a criminal trials, a verdict which is logically inconsistent upon the facts, such a verdict is wanting and should not be permitted to stand. See United States v. Maybury, 274 F. 2d 899 (2nd Cir. 1960), and United States v. Jackson, 30 U. S. 570, 88 S. Ct. 1209 (1968).

III

A DEFENDANT IS ENTITLED TO A UNANIMOUS VERDICT ON EACH COUNT OF THE INDICTMENT BY A JURY OF HIS PEERS AND WHEN A FACTUALLY INCONSISTENT VERDICT IS RETURNED SUCH A DEFENDANT IS DENIED THIS RIGHT

In a criminal case, a defendant is entitled to an unanimous verdict by the jury on each separate count of the indictment; and each unanimous verdict must be supported by adequate probative evidence, and not by guess, surmise or compromise.

For a jury to bring back a factually inconsistent verdict indicates that the facts of the case have not been fully determined as the facts are still in conflict. Under the Sixth Amendment to the Constitution of the United States, the defendant has a right to a unanimous verdict on each of the charges against him. Andres v. United States, 333 U.S. 740, 748, 68 S. Ct. 884 (1948). Where the finding of the jury on one count is inconsistent with its finding on another count, this indicates that the jury has not properly resolved the matter, but rather has compromised. It is this compromise which deprives the defendant of his right to an unanimous verdict on each count.

The appropriate remedy for the inconsistent guilty verdict is a remand to the trial court below with directions to enter a verdict of "not guilty". Though in a civil case, the remedy is or may be a

new trial, in a criminal case the remedy is judgment of acquittal on the inconsistent guilty verdict. To remand for a new trial may be contrary to a defendant's right against double jeopardy on the charge on which he was found not guilty. Green v. United States, 355 U. S. 184, 188, 78 S.Ct. 221, 223 (1957).

A remand on the charge of assault with a dangerous weapon would be contrary to the facts found by the jury in the trial. The only evidence of an assault was with a gun. Since ⁱⁿ a new trial there could be no evidence or testimony on the defendant's possession of a gun as that matter had already been determined, United States v. Maybury, supra, there would be no basis for a new trial on that issue. Thus, the court below should be ordered to enter a directed verdict of "not guilty" on the second count of the indictment.

IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IN ORDER TO CONVICT, IT SUFFICES THAT THERE BE AN "ATTEMPT OR EFFORT WITH FORCE OR VIOLENCE TO DO INJURY TO THE PERSON OF ANOTHER, COUPLED WITH THE APPARENT PRESENT ABILITY TO CARRY OUT SUCH AN INTENT"

The record in this case reveals that the gun found by Officer Kornegay (Tr. 56) contained six empty 32 caliber cartridge shells, all of which were introduced into evidence as Government exhibits Nos. 2 and 2-A (Tr. 59-61). Thus, when the 32 caliber revolver, Government's exhibit No. 1 was found by Officer Kornegay, this gun was empty since all six shells contained therein had been fired and expended and the gun was empty. Appellant submits therefore, that the part of the Court's charge to the jury defining the offense contained in the second count of

the indictment and the essential elements required to be proven by the Government beyond a reasonable doubt before guilt can be established (Tr. 494-495) was error. The prevailing rule is stated at 3 Underhill on Criminal Evidence, Sec. 688, at 1632 (5th ed. 1957):

"An unloaded gun, used as a firearm only, is generally held not to be a deadly weapon, while an unloaded gun used as a club is or is not a dangerous weapon depending upon its size and the way it is used. (Accord, Annot., 74 A.L.R. 1206 (1931); see also 6 Am. Jur. 2d, Assault and Battery, Sec. 54 at 51).

In the case of Price v. United States, 156 Fed. 950, at 952 (9th Cir. 1907), where the accused pointed an unloaded pistol at his victim in a threatening manner, putting the victim in fear, the Court said:

"An unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon."

* * *

"The Courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon."

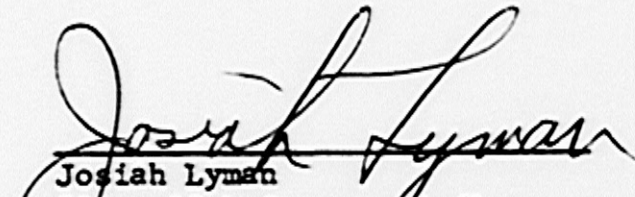
The law in the District of Columbia is not to the contrary. This Court has adopted the definition of a dangerous weapon as "one likely to produce death or great bodily harm or injury." Tatum v. United States, 71 App. D. C. 393, at 394, 110 F.2d 555, at 556 (1940). Appellant submits that the empty pistol in the case at bar does not fall within this definition.

CONCLUSION

Accordingly, appellant respectfully submits that the verdict of the jury finding appellant "guilty" of the second count

of the indictment should be vacated, set aside and held for naught,
and that this case be remanded to the lower court with instructions
that a directed verdict of "not guilty" and a judgment of acquittal
be entered thereon.

Respectfully submitted,


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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that this 5th day of December, 1969,
I served a copy of the foregoing Brief of Appellant on Thomas A.
Flannery, Esquire, United States Attorney, United States Court
House, Washington, D. C., by U. S. Mail, postage prepaid.

Josiah Lyman
Attorney for Appellant